UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BASHAS' INC.

and **Case 28-CA-168505**

CARLOS MEJIA, an Individual

ANSWERING BRIEF OF BASHAS' INC. TO THE NATIONAL LABOR RELATIONS BOARD

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Esplanade Center III, Suite 800
2415 East Camelback Road
Phoenix, Arizona 85016
Telephone: (602) 778-3700
Facsimile: (602) 778-3750

Thomas M. Stanek
Elizabeth M. Townsend

Attorneys for Bashas' Inc.

The Initial Brief of the Counsel for the General Counsel ("CGC") suffers from two glaring and fatal errors. First, the CGC fails to recognize – or even reference – the General Counsel's March 18, 2015 Report Concerning Employer Rules, Memorandum GC 15-04 ("G.C. Memo"), which the General Counsel expressly issued to provide "specific examples of lawful and unlawful handbook policies and rules" that would "be of assistance to labor law practitioners and human resource professionals." G.C. Memo at 3. Prior to issuing the employee handbook at issue, Respondent Bashas' Inc. ("Bashas'") analyzed the Board's guidance and drafted its handbook in reliance on the G.C. Memo. Inexplicably, the CGC fails to explain how it can now challenge policies previously found lawful by the Board and the Office of the General Counsel, and provided as examples to guide employers' compliance with the Act. Such an irrational (and unjustified) approach wastes not only government resources, but it stymies the good faith efforts of employers (like Bashas') to draft lawful employment policies.[1]

Second, the CGC's arguments in its Initial Brief do nothing to establish an actual violation of the Act. Instead, the CGC resorts to contorted, nonsensical readings of Bashas' policies that improperly conflate clear terms and rely on inapposite case law in an unjustified attempt to find a violation where none exists. The CGC ignores the plain fact that Bashas' policies were specifically drafted to follow the G.C. Memo and existing Board precedent, such as requiring cooperation in performing work duties, defining confidential business information as

[1] The CGC's Initial Brief also fails to explain how this matter is even properly before the Board, as the Region appears to have initiated this action on its own accord in violation of the principles adopted by the United States Supreme Court in *NLRB v. Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, Local 22*, 391 U.S. 418 (1968) (holding that the Board cannot initiate its own proceedings). *See also Allied Waste Servs. of Mass. LLC*, 2014 WL 7429200, at *1 (Dec. 21, 2014) (noting the Region cannot subpoena an employee handbook for "the purpose of initiating or expanding charges or investigations"); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 951 (D.C. Cir. 2013) ("Neither the Board nor its agents are authorized to institute charges *sua sponte*.").

separate from employee personnel files or other terms and conditions of employment, requiring employees to keep personal items secure during working time, prohibiting solicitation by email during working time and directing employees not to publicize information protected by privacy rights and other laws, such as social security information, on social media. No employee could read those policies in context and still reasonably believe that they interfere with their Section 7 rights. The CGC's arguments are misplaced and its Complaint should be dismissed.

I. BASHAS' "PLEDGE AND GOALS" POLICY DOES NOT VIOLATE THE ACT.

The CGC admits that the first provision in Bashas' Pledge and Goals Policy, which asks employees to show "respect and consideration for our customers and our work environment," does not expressly limit Section 7 rights. [CGC's Initial Br. at 9.] To avoid that clear fact, the CGC attempts to argue that employees would somehow reasonably read the phrase "work environment" to bar employees from complaining about management and the Company in violation of their Section 7 rights. That argument fails, however, as the CGC relies on case law interpreting policies that expressly prohibited **any** communications that could affect relationships with co-workers or supervisors, which could include criticisms of the company/management as well as heated debates regarding terms and conditions of employment. [CGC's Initial Br. at 9.]

For example, the *William Beaumont Hospital* case relied on by the CGC involved a policy that barred **any** conduct that "impedes harmonious interactions and relationships," which the Board felt was "sufficiently imprecise" to "encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7." 363 NLRB No. 162, slip op. at 1-2 (April 13, 2016); *see also T-Mobile*, 363 NLRB No. 171, slip op. at 3 (2016) (policy requiring employees to avoid "arguing . . . with co-workers, subordinates or supervisors" and to "maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-

workers, and management" could be read as "prohibiting disagreements or conflicts, including protected discussions"). The G.C. Memo – which the CGC fails to recognize or follow in this case – similarly distinguishes policies reasonably read to prohibit Section 7 criticisms of the employer because they expressly reference the company and/or management. *See* G.C. Memo at 7 (indicating that the policies at issue were unlawful because they required employees to "be respectful to the company" and directed employees not to "make fun of, denigrate, or defame . . . the Company" or make "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company] . . . or management"). In comparison, "a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found to be lawful." *Id.*

Here, the only relationship addressed in Bashas' Pledge and Goals Policy is with Bashas' customers, which the CGC does not – and cannot – argue is unlawful. *See* G.C. Memo at 8-9 (noting an employer can lawfully prohibit "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company, or being "discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business"). Unlike the case law relied on by the CGC and the policies identified as unlawful in the G.C. Memo, Bashas' Pledge and Goals Policy does not limit **any** communications – let alone Section 7 criticism of management or heated Section 7 debates with co-workers.[2] It simply asks employees to be respectful of the "work environment," which is generally understood to mean "the surrounding conditions in which an employee operates," including "physical conditions,

[2] While the *2 Sisters Food Group, Inc.* case cited by the CGC involved a "work harmoniously" rule that the Board felt was "sufficiently imprecise" enough to including Section 7-protected arguments, 357 NLRB 1816, 1817 (2011), the CGC does not claim that Bashas' Pledge and Goals Policy could reasonably be read to include Section 7 discussions between co-workers, nor could the Policy be read in that manner for the reasons stated above.

such as office temperature, or equipment, such as personal computers," as well as "factors such as work processes or procedures." Definition of Work Environment, http://www.money-zine.com/definitions/career-dictionary/work-environment/ (last visited Oct. 14, 2016); *accord* Definition of Work Environment, http://www.businessdictionary.com/definition/work-environment.html (last visited Oct. 14, 2016) ("When pertaining to a place of employment, the work environment involves the physical geographical location as well as the immediate surroundings of the workplace, such as a construction site or office building. Typically involves other factors relating to the place of employment, such as the quality of the air, noise level, and additional perks and benefits of employment such as free child care or unlimited coffee, or adequate parking."). By asking its employees to be respectful of the "work environment," Bashas' is asking its employees not to do such things as: slam doors, misadjust thermostats within Bashas' stores and storage areas, damage or destroy product, engage in horseplay that could injure individuals or property, litter or deface equipment or property, or engage in other acts of negligence, recklessness or violence that could negatively impact the physical working environment. All of those things constitute legitimate business reasons for Bashas' to ask its employees to "[s]how respect and consideration for our customers and our work environment."

Second, the CGC's Initial Brief fails to recognize Board precedent and the G.C. Memo requiring provisions to be read in context, not isolation. G.C. Memo at 4-6, 9, 11-12, 16-17, 19 (quoting *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (stating the Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights")). Here, the challenged provision is contained in a policy specifically addressing job performance expectations, including performing assigned tasks and responsibilities to the best of the employee's abilities, being willing to continually learn and

improve job skills and performance, and striving for excellence in performing jobs and assisting customers and co-workers. [Jt. Ex. 2 at 3.] Preceding the challenged language on the same page, Bashas' Pledge and Goals Policy asks employees to pledge to "[P]rovide and maintain a clean and healthy **working environment** for all members." [Jt. Ex. 2 at 3 (emphasis added).] As used in that sentence (and as used in the challenged language) the term "working environment" clearly refers to the physical workplace. No employee would reasonably assume that the term "working environment" includes supervisors or managers. It would be illogical for a company to ask its employees to pledge to "provide and maintain a clean and healthy" management team, or "clean and healthy" supervisors or managers. The term "work environment" in the challenged language is limited to the physical working conditions in which Bashas' employees perform their job duties. Without more, simply asking employees to be respectful of their work environment in no way chills or interferes with Section 7 rights.

Bashas' Pledge and Goals Policy is actually similar to another policy in *William Beaumont Hospital*, where the Board found that the employer could lawfully prohibit employees from "engaging in behavior that is rude, condescending or otherwise socially unacceptable . . . [or] disruptive to maintaining a safe and healing environment." 363 NLRB No. 162, slip op. at 1-2; *see also Lutheran Heritage*, 343 NLRB at 647-49 (finding employees would not interpret a rule prohibiting "abusive or profane language" to encompass Section 7 rights, as "employers have a legitimate right to establish a 'civil and decent work place'"). Just as in those cases, the context of Bashas' Pledge and Goals Policy clarifies the true intent of the challenged language. The challenged language simply asks employees to be respectful and show consideration for customers and their general work environment when performing their job duties. It does not

limit any conversations – let alone conversations that could reasonably encompass Section 7 discussions criticizing management, the Company, or terms and conditions of employment.

The CGC's arguments in regards to the second challenged provision in Bashas' Pledge and Goals Policy similarly fail. That provision, which asks employees to "[w]ork in a cooperative manner with management, co-workers, customers and vendors," specifically tracks language identified as lawful in the G.C. Memo based on existing Board precedent. G.C. Memo at 9 (citing *Copper River of Boiling Springs*, 360 NLRB No. 60, slip op. at 1 n.3 (Feb. 28, 2014) (policy prohibiting "[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests. This includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests" was lawfully limited to "unprotected conduct that would interfere with the Respondent's legitimate business concerns")). As the G.C. Memo explains, "rules requiring employees to cooperate with each other **and the employer** in the performance of their work also usually do not implicate Section 7 rights." *Id.* (emphasis added).[3] Indeed, the CGC's brief **concedes** that "[r]ules requiring employees to cooperate with . . . the employer in the performance of their work also usually do not implicate Section 7 rights." [CGC's Initial Br. at 8.]

Inexplicably, the CGC's brief contradicts itself just two pages later and argues that employees **cannot** be required to work cooperatively with management. [CGC's Initial Br. at 10.] That makes no sense. While the CGC attempts to rely on the Board's recent decision in *William Beaumont Hospital* to justify challenging policy language identified as lawful in the G.C. Memo, that case did not address expectations regarding employee work performance.

[3] While the policy in *Copper River of Boiling Springs, LLC* case happened to reference insubordination towards a supervisor or manager, 360 NLRB No. 60, slip op. at 1, that does not mean that employers can prohibit non-cooperation in performing work **only** if it rises to the level of insubordination.

Rather, *William Beaumont Hospital* involved a provision prohibiting **any** conduct that "impedes harmonious interactions and relationships," which the Board felt was "sufficiently imprecise" enough to encompass Section 7 discussions. 363 NLRB No. 162, slip op. at 2. The ability to engage in Section 7 discussions is completely separate and apart from how an employee performs his or her job. Employers have the right to set job performance expectations for their employees and requiring employees to "work in a cooperative manner" is sufficiently precise to address an employer's inherent business interest in assuring satisfactory work performance without a reasonable employee interpreting that provision to restrict Section 7 rights. *See* G.C. Memo at 9. *William Beaumont Hospital* did nothing to change that.[4] Because Bashas' Pledge and Goals Policy tracks the "work in a cooperative manner" language identified by the G.C. Memo as lawful based on Board precedent, it does not violate the Act as alleged.

II. BASHAS' "CONFIDENTIAL PROPRIETARY INFORMATION" POLICY DOES NOT VIOLATE THE ACT.

Nothing in Bashas' Confidential Proprietary Information Policy can reasonably be read to interfere with Section 7 rights. As explained in Bashas' Initial Brief, the Confidential Proprietary Information Policy expressly distinguishes between proprietary business information and employee personnel files. The Policy details how the Company keeps **both** types of information (proprietary business information and employee personnel records) confidential in most cases. [Jt. Ex. 2 at 17.] In comparison, the Policy requires Bashas' employees to keep **only**

[4] While the CGC claims that "cooperation with management" could be read to encompass strikes or other protected work stoppages, that argument conveniently ignores the "work" context while relying on inapposite case law dealing with specific "no walk-off" rules that the Board has traditionally interpreted to encompass Section 7-protected strikes. *See Ambassador Servs., Inc.*, 358 NLRB 1172, 1172-73 (2012), *vacated by* 134 S. Ct. 2901 (2014), *reaffirmed in relevant part by* 361 NLRB No. 106, slip op. at 1 (2014); *Ready, Inc.*, 331 NLRB 1656, 1656 n.2 (2000). Nothing in Bashas' employee handbook addresses "walking off the job" or "work stoppages." *See* G.C. Memo at 17 (noting that, "in the absence of terms like 'work stoppage' or 'walking off the job,' a rule forbidding employees from leaving the employer's property during work time without permission will not reasonably be read to encompass strikes").

"proprietary business information" and "confidential information regarding the company's vendors or customers" confidential. [*Id.*] The Policy makes no mention of "personnel files" in relation to employee confidentiality obligations. [*Id.*] As the G.C. Memo notes, policies that prohibit only the disclosure of "business 'secrets' or other confidential information" or "confidential financial data, or other non-public company information [including] confidential information regarding business partners, vendors or customers" do not contain language reasonably construed to prohibit Section 7 communications. G.C. Memo at 6; *see also, e.g.*, *Mediaone of Greater Fla., Inc.*, 340 NLRB 277, 279 (2003) (confidentiality rule would not reasonably chill Section 7 rights when it did not explicitly prohibit employees from discussing terms and conditions of employment and would reasonably be read to apply only to company's "proprietary business information" that employers "have a substantial and legitimate interest in" protecting) (citing *Super K-Mart*, 330 NLRB 263, 263, 264 (1999) (employer rule stating that "Company business and documents are confidential" and "disclosure of such information is prohibited" found lawful); *Lafayette Park*, 326 NLRB 824, 826 (1988) (employer rule prohibiting "divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information" found lawful)).

The CGC attempts to cloud the issue by arguing that deeming personnel files to be Bashas' "property" somehow transforms them into "proprietary business information" that employees must keep confidential. [CGC Initial Br. at 12-13.] However, the CGC's argument is unfounded. First, "property" is not the same as "proprietary business information." "Property" can include, among other things, Bashas' stores, equipment, and products for sale. However, not all "property" is "proprietary business information." For example, Bashas' non-public marketing strategies would be both "proprietary business information" and "confidential." In comparison,

the products for sale in Bashas' stores are not "proprietary business information" or "confidential." The fact that the handbook indicates that employee personnel files are Bashas' "property" does not reasonably make those files "proprietary business information." In fact, it is hard to imagine how a personnel file could be proprietary in any way.

The cases cited by the CGC in its Initial Brief do not support its argument. The policies in those cases expressly prohibited employees from disclosing specific personnel information, such as "any information concerning [employees]," "personnel information," an "employee's personnel file," "wages and working conditions such as disciplinary action," and "employee information." [CGC Initial Br. at 11 nn.43-44.] By inappropriately conflating the clear language in Bashas' Confidential Proprietary Information Policy that requires employees to keep only "proprietary business information" confidential with separate provisions addressing Bashas' commitment to keep both "proprietary business information" and "personnel files" confidential, the CGC clearly is trying to find a violation where none exists.

Further, while the CGC recognizes that rules exempting out Section 7 activity are lawful, the CGC nonsensically argues that Bashas' disclaimer language (which expressly states that the Confidential Proprietary Information Policy does not "cover members' discussion of wages, hours, or conditions of employment") is insufficient. [CGC's Initial Br.at 10.] To support its position, the CGC relies on another inapposite case, *ISS Facilities Services, Inc.*, which involved ambiguous language stating that employees could file a charge "if, and only if, applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate" that the Board felt a layperson would not understand. 363 NLRB No. 106, slip op. at 3 (2016). In comparison, Bashas' Confidential Proprietary Information Policy specifically identifies and exempts out Section 7 activity in common sense language that a layperson would understand:

"discussion of wages, hours, or conditions of employment." [Jt. Ex. 2 at 17.] Indeed, it is modeled after almost identical language agreed on in the Wendy's bilateral Board settlement and identified by the G.C. Memo as part of a lawful policy. *See* G.C. Memo at 29 ("Nothing in this section prohibits employees from discussing terms and conditions of employment."). Accordingly, no reasonable employee would read Bashas' Confidential Proprietary Information Policy as interfering with Section 7 rights in any way.

III. BASHAS' "PERSONAL BELONGINGS" AND "CELL PHONES AND ELECTRONIC DEVICES USAGE" POLICIES DO NOT VIOLATE THE ACT.

The CGC admits that Bashas' Personal Belongings Policy does not expressly prohibit photography or recordings in the workplace. [CGC's Initial Br. at 14.] Rather, the Personal Belongings Policy simply directs employees to keep all personal items (which can include cellphones, iPods, digital cameras and similar electronic devices) stored in employee lockers or vehicles during work hours or work time. [Jt. Ex. 2 at 23.] Nor does the Cell Phones and Electronic Devices Usage Policy prohibit all workplace recordings. As explained in Bashas' Initial Brief, that Policy simply explains that such personal items can be distracting and reasonably can interfere with customer service during working time. Such devices also can raise potential legal concerns, such as invasion of privacy, harassment and disclosure of proprietary information. [Jt. Ex. 2 at 23 and 26.] Absolutely nothing in the challenged policies prohibits the use of cell phones, cameras or other recording devices to engage in Section 7 activities.

In comparison, the policies in *Whole Foods Market Group, Inc.* "unqualifiedly prohibit[ed] **all** workplace recording" and did not "differentiate between working and non-working time." 363 NLRB No. 87, slip op. at 4 & n.10 (2015) (emphasis added). Furthermore, the *Whole Foods* recording rules unlawfully required employees to obtain permission from the employer before "engaging in protected concerted activity on an employee's free time and in

non-work areas." *Id.*, slip op. at 4 n.10. The *Whole Foods* decision distinguished the Board's earlier decision in *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), where a ban on the use of cameras for recording purposes was found lawful, in part, because it was limited to "work time." *Id.* at 4, n.12 (citing and quoting policy language from *Flagstaff Medical Center*). Here, the challenged policies are similarly limited to activities during working time. [Jt. Ex. 2 at 26.] The CGC has not cited to – and cannot cite to – any Board law finding a policy that requires employees to keep cell phones, cameras and other devices in their lockers or cars during working time to be a violation of the Act.

IV. BASHAS' "SOLICITATION AND DISTRIBUTION" RULES DO NOT VIOLATE THE ACT.

The CGC's attack on Bashas' Solicitation and Distribution Rules is yet another example of the CGC's inexplicable refusal to recognize – let alone analyze – the G.C. Memo. In that Memo, the General Counsel specifically analyzed Wendy's solicitation and distribution policy, which was revised as part of a Board settlement. Wendy's original policy prohibited distribution in working areas at any time and solicitation during working time, which is lawful under settled Board law. *See* G.C. Memo at 25. However, Wendy's original policy went on to state that the "guidelines also apply to solicitation **and/or distribution** by electronic means," which could include electronic distribution during non-working time. *Id.* (emphasis added). The G.C. Memo explained that, because "electronic distribution does not produce litter and only impinges on the employer's management interests if it occurs on working time," the rule prohibiting "**distribution** by electronic means in work areas," was unlawful. *Id.* at 25-26 (emphasis added).

Wendy's ultimately modified its rules "pursuant to an informal, bilateral Board settlement agreement, which the Office of the General Counsel does not believe violate the Act." *Id.* at 3. The revised Wendy's policy now prohibits "the distribution of literature in work areas"

as well as "solicitation and distribution literature during employees' working time," as permitted under long-standing Board law. However, to address the Board's concern that the rules prohibited distribution by electronic means during non-working time without a legitimate business justification, the Board settlement required Wendy's to remove the phrase "and/or distribution" from the "electronic means" provision, leaving the policy to read as follows: "**These guidelines also apply to solicitation by electronic means**." G.C. Memo at 29 (emphasis added). As pointed out in Bashas' Initial Brief, the Company specifically drafted its Solicitation and Distribution Rules to mirror that lawful policy provision. [Jt. Ex. 2, at 27 (adopting the exact same language found in the revised Wendy's policy: "**These guidelines also apply to solicitation by electronic means**" (emphasis added).] Like the Wendy's revised policy, Bashas' Solicitation and Distribution Rules state that solicitation, including solicitation by electronic means, is prohibited only during working time. [Jt. Ex. 2, at 27.] The Rules contain no similar restrictions on distributing materials by electronic means.

Because the clear language of Bashas' Solicitation and Distribution Rules does not violate the Act, the CGC's Initial Brief attempts to create a non-existent prohibition by improperly confusing the lawful prohibition on distribution in "working areas" and the lawful statement that "[t]hese guidelines apply to **solicitation** by electronic means" [Jt. Ex. 1(e) at 3-4 (emphasis added)] to argue that employees would read the policy to restrict "**distribution** of documents by electronic means" during non-working time. [CGC Initial Br. at 17 (emphasis added).] That is absurd. In addressing that exact concern with Wendy's original policy language, the Board simply removed the phrase "and/or distribution" from the phrase addressing electronic means to make clear it did not encompass distribution on non-worktime time via

electronic means – leaving the **exact** language used in Bashas' policy. *See* G.C. Memo at 29. Accordingly, Bashas' Solicitation and Distribution Rules do not violate the Act as alleged.

V. BASHAS' "PERFORMANCE STANDARDS" POLICY DOES NOT VIOLATE THE ACT.

Identical to Bashas' Pledge and Goals discussed above, Bashas' Performance Standards Policy asks employees to "work in a cooperative manner with management and their coworkers." [Jt. Ex. 2 at 28.] As explained above, employers can legitimately require employees to work in a cooperative manner with management. As the Policy explains, the goal of that request is to "create and maintain a great shopping experience for our customers," which is a legitimate business interest. [Jt. Ex. 2 at 28.] *See Copper River of Boiling Springs*, 360 NLRB No. 60, slip op. at 1, 46 (rule lawfully limited prohibited displays of a negative attitude to a display "that is disruptive to other staff or has a negative impact on guests").

To that end, Bashas' Performance Standards Policy specifically mirrors language identified as lawful by the G.C. Memo. G.C. Memo at 9 (citing *Copper River of Boiling Springs*, 360 NLRB No. 60, slip op. at 1 n.3 (Feb. 28, 2014)). Again, the CGC fails to recognize the G.C. Memo's guidance or cite to any case law suggesting that employers no longer have the right to dictate job performance by asking employees to work in a cooperative manner with management and co-workers. Accordingly, nothing in Bashas' Performance Standards Policy interferes with Section 7 rights in violation of the Act.

VI. BASHAS' "SOCIAL NETWORKING COMMUNICATIONS POLICY" DOES NOT VIOLATE THE ACT.

The CGC's sole challenge to Bashas' Social Networking Communications Policy is the language in one of nine bullet points, which states that employees should not post information online if it "[v]iolates the privacy rights of another member, such as social security information." [Jt. Ex. 2 at 30.] While the CGC claims that employees would reasonably read that provision as

interfering with their Section 7 rights to disclose their co-workers' names, telephone numbers, home addresses, and terms and conditions of employment, there is absolutely no merit to such an incredibly broad interpretation given the plain language of the Policy.

Nowhere does Bashas' Social Networking Communications Policy mention names, contact information, terms and conditions of employment, or otherwise expressly restrict Section 7 rights. Rather, Bashas' Policy narrowly defines "privacy rights" by giving the example of "social security information," which even the CGC admits is a legitimate and lawful basis to restrict employee social networking activity. [CGC Initial Br. at 18.] The CGC's Initial Brief also improperly ignores the other eight bullet points in Bashas' Social Networking Communications Policy, which demonstrate that the Policy is aimed at legal rights and obligations such as laws prohibiting harassment, discrimination, maliciously false statements, and infringement on copyright and other intellectual property rights. [Jt. Ex. 2, at 30.]

The CGC cites to no authority supporting its argument that not posting information online that violates "privacy rights" would reasonably be read to include sharing employee contact information, or terms and conditions of employment, with a union or co-workers. Nor does the CGC cite to any Board law suggesting that employees have a Section 7 right to post information on social media that violates their co-workers' privacy interests in their social security information, bank account numbers, names of their dependents, tax-withholdings, or applicable wage garnishments. Those items clearly fall within an employee's "privacy interest" and have absolutely nothing to with an employee's Section 7 right to provide a contact list to a union or discuss terms and conditions of employment with co-workers online. The CGC's arguments regarding Bashas' Social Networking Communications Policy are misplaced. The Policy does not violate the Act as alleged.

VII. CONCLUSION

For the above reasons and the reasons detailed in Bashas' Initial Brief, Bashas' respectfully requests that the Board dismiss the Complaint in its entirety.

Dated this 14th day of October, 2016.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By _____
Thomas M. Stanek
Elizabeth M. Townsend
2415 East Camelback Road, Suite 800
Phoenix, Arizona 85016
602-778-3700
602-778-3750 (facsimile)
Attorneys for Bashas' Inc.

ORIGINAL e-filed
this 14th day of October 2016, to:

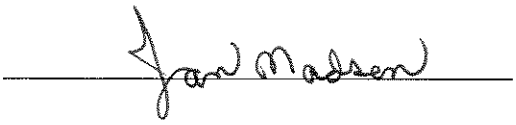
Gary Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

COPIES of the foregoing e-mailed
this 14th day of October 2016, to:

Nestor M. Zarate Mancilla
Counsel for the General Counsel
National Labor Relations Board – Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
nestor.zarate-mancilla@nlrb.gov

Cornele A. Overstreet
Regional Director
National Labor Relations Board – Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
cornele.overstreet@nlrb.gov

Carlos Mejia
161 South Maple Street
Chandler, AZ 85226-3561
cheleguanaco@live.com



26544551.1